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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 622

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, AND COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD AND THE TOWNSHIP OF TEANECK; AND CITIZENS UNITED TRANSIT COMMITTEE,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Appellees.

On Appeal From the United States District Court for the District Court of New Jersey

STATEMENT AS TO JURISDICTION

MILTON T. LASHER,
Administrative Building,
Hackensack, New Jersey,

GEORGE S. WRITER,
30 Broadway,
Nyack, New York,

WILLIAM A. ROBERTS,
600 Continental Building,
Washington 5, D. C.,
Attorneys for County of Bergen, State of New Jersey; et al.; Appellants.

IRENE KENNEDY,
MAXWELL A. HOWELL,
of Counsel.

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TABLE OF CONTENTS

	Page
Statement as to Jurisdiction	1
Opinions Below	2
Basis of Jurisdiction	3
Questions Presented	5
Statement of the Case	7
The Questions Presented Are Substantial	11
A. The Issues on the Validity of the Actions of the Railroad and of the Commission	12
1. Invalidity of the Notice filed by the Railroad	12
2. Section 13(1) and (2) proceedings are applicable to Section 13a(1)	14
3. and 4. Availability of Judicial Review of the Commission's Notice and Order	16
5. Failure to consider recommended fare increases as relieving financial burden	20
6. Whether or not to regulate does not rest upon the sole discretion of the Commission.	21
B. The Constitutional Issues	23
7. Absence of Legislative Standards	23
8. Section 13a(1), as construed, is violative of the 5th Amendment	25
9. and 10. Right to trial *de novo* on Constitutional Issues	29
Conclusion	31

Appendix A—Majority Opinion of the District Court	1a
Dissenting Opinion	20a
Appendix B—Notice of the Commission dated August 26, 1958	29a

Page

Appendix C—Order of the Commission dated September 2, 1958 ..... 30a

Appendix D—Final Order and Decree of District Court 32a

Appendix E—Portions of the Interstate Commerce Act 49 U.S.C.: Sec. 1(18) and (19); Sec. 13(1) and (2), and Sec. 13a(1) .. 33a

TABLE OF CASES

Atlantic C. L. R. Co. v. Georgia, 234 U.S. 280 (1914) .. 22
Baltimore & O. R. Co. v. United States, 298 U.S. 349 (1936) 31
Berman v. Parker, 348 U.S. 26 (1954) 4
Board of Public Utility Comm., et al. v. United States, et al., 158 F. Supp. 98 (DC NJ 1957) 8
Braniff Airways v. Nebraska State Board, 347 U.S. 590 (1954) 22
California v. Thompson, 313 U.S. 109 (1941) 22
Cardwell v. American River Bridge Co., 113 U.S. 205 (1885) 22
Chicago B. R. Co. v. Osborne, 265 U.S. 14 (1924) 4, 30
Chicago, Milwaukee, St. P. & P. R. Co. v. Illinois, 355 U.S. 300 (1958) 4
Conway v. Taylor, 66 U.S., 1 Black 603 (1862) 22
Covington & C. Bridge Co. v. Kentucky, 154 U.S. 204 (1894) 21
Crocker v. United States, 127 F. Supp. 568, 130 Ct. Cl. 567 (1955) 19
Crowell v. Benson, 285 U.S. 22 (1932) 29, 30
Currin v. Wallace, 306 U.S. 1 (1939) 26
Fanning v. Gregoire, 57 U.S., 15 How. 524 (1853) 22
Frozen Food Express v. United States, 351 U.S. 40 (1956) 17
Gillman v. Philadelphia, 70 U.S., 3 Wall 713 (1866) .. 22
Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196 (1885) 22
Homovitch v. Chapman, 79 U.S. App. D.C. 150 (1951) 18
Interstate Commerce Commission v. Baird, 194 U.S. 25 (1904) 15

Page

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88 (1913) 26
Interstate Commerce Commission v. Union Pac. R. Co., 222 U.S. 541 (1912) 18
Ludecke v. Watkins, 335 U.S. 160 (1947) 20
Mastrapasqua v. Shaughnessy, 180 F. 2d 999 (CA 2, 1950) 19
Missouri, K. & T. R. Co. v. Oklahoma, 271 U.S. 303 (1926) 29-30
Morgan v. United States, 298 U.S. 468 (1936) 18
Morgan v. United States, 304 U.S. 1 (1938) 28
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 28
Myles Salt Co. v. Board of Com'rs. of Iberia & St. Mary's Drainage District, 239 U.S. 478 (1916) .. 19
New York C. & H. R. R. Co. v. Hudson County, 227 U.S. 248 (1913) 22
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) ... 24
Port Richmond & B.P.F. Co. v. Hudson County, 234 U.S. 317 (1914) 22
Pound v. Turck, 95 U.S. 459 (1878) 22
St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 30
Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 24
Southern Pacific R. Co. v. Arizona, 325 U.S. 761 (1945) 22
Spano v. Western Fruit Growers, 85 F. 2d 150 (CA 10 1936) 30, 31
The New England Divisions Case, 261 U.S. 184 (1923) 18
The New York Central Railroad Company v. Board of Public Utility Comm. et al., Supreme Court of the United States, October Term 1957, No. 838; October Term 1958, No. 41 9
United States v. Chicago, M. St. P. & R. R. Co., 282 U.S. 311 (1931) affirming Chicago, M. St. P. & R. R. Co. v. United States, 33 F. 2d 582 (N.D. Ill. 1929) 25
United States v. Dillman, 146 F. 2d 572 (CA 5, 1944) 28
United States v. Louisville & N. R. Co., 235 U.S. 314 (1914) 18, 29, 30
Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365 (1883) 22

Page

Wilmington Transp. Co. v. Railroad Com., 236 U.S. 151 (1915) 22
Wilson v. Blackbird Creek March Co., 27 U.S., 2 Pet. 245 (1829) 22

CONSTITUTION OF THE UNITED STATES

Article I, Sec. 1 24
Article I, Sec. 8, par. 3 24
Fifth Amendment 25, 29

STATUTES

Interstate Commerce Act, 49 U.S.C.
Sec. 13 10
Sec. 13(1) and (2) 5, 14, 15, 26, 27
Sec. 13a(1) 4, 5, 6, 10, 11, 12, 13, 14, 15, 17, 22, 23, 25, 26, 27, 28
Sec. 1(18) 5, 7, 8, 13, 20
National Transportation Policy, 49 U.S.C. preceding Sec. 1 13

Administrative Procedure Act
Sec. 1001(d) 17
Sec. 1001(g) 16
Sec. 1009 ..... 3, 5, 16, 18

Title 28, U.S.C.
Sec. 1253 4
Sec. 1336 ..... 3, 5, 16, 17
Sec. 1398 3
Sec. 2282 3
Sec. 2284 3
Sec. 2321-2325 3
Sec. 1331 3

MISCELLANEOUS

Vom Bauer, *Federal Administrative Law* (ed. 1942), 18, 30, 31

SUPREME COURT RULES

Rule 13 2
Rule 15 2

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OCTOBER TERM, 1958

No.

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vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellees.*

On Appeal From the United States District Court for the District Court of New Jersey

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STATEMENT AS TO JURISDICTION

Appellants,* plaintiff-intervenors below, appeal from the final order and decree of the specially con-

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* County of Bergen, State of New Jersey; County of Rockland, State of New York; the Boroughs of Bergenfield, Bogota, Dumont, Harrington Park, Haworth, Norwood and the Township of Teaneck, municipal corporations of the State of New Jersey; and the Citizens United Transit Committee, an unincorporated association

stituted three-judge United States District Court for the District of New Jersey entered December 4, 1958, dismissing the complaint of appellants and dissolving the preliminary injunction theretofore granted and issued. Appellants submit this statement in compliance with Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States to show the basis upon which the Supreme Court has jurisdiction on direct appeal to review the said judgment of the District Court and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the majority of the specially constituted District Court of three judges and the dissenting opinion of Circuit Judge McLaughlin are not yet reported. The majority opinion of the District Court and the dissenting opinion of Circuit Judge McLaughlin are annexed hereto as Appendix A. The "Notice" of the Commission dated August 26, 1958, Finance Docket No. 20291, and its "Order" therein dated September 2, 1958, also are not reported and are annexed hereto as Appendices B and C, respectively. The final order and decree of the majority of the District Court is annexed hereto as Appendix D.

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of users. The State of New Jersey and the Board of Public Utility Commissioners of the State of New Jersey, plaintiffs below, have filed their separate notice of appeal; they will be referred to throughout this Statement as to Jurisdiction as "State" and "Board" respectively. The New York Central Railroad Company hereinafter will be referred to as the "Railroad"; the United States of America as the "United States"; the Interstate Commerce Commission as the "Commission".

BASIS OF JURISDICTION

I.

This action was instituted in the District Court by the State and Board against the United States, the Commission and the Railroad for an order enjoining the discontinuance by the Railroad of its Weehawken Ferries operating between Weehawken, New Jersey and New York City, New York ostensibly pursuant to Section 13a(1) of the Interstate Commerce Act, 49 U. S. C., and for a further order enjoining, annulling and setting aside the order and determination of the Commission, wherein the Commission decided not to enter upon an investigation of or otherwise stay the proposed discontinuance and dismissing certain complaints and petitions filed thereon with the Commission. The suit commenced pursuant to 28 U. S. C. §§ 1336, 1398, 2282, 2284, 2321-2325, 1331 and 5 U. S. C. 1009.

Thereafter, appellants, having been parties to the action before the Commission by virtue of their complaint and petition for reconsideration there filed, were permitted to intervene as plaintiffs by the District Court and to file a complaint and to be heard on brief and argument.

II.

The final judgment of the United States District Court for the District of New Jersey (Circuit Judge McLaughlin dissenting) was entered on December 4, 1958. Notice of appeal was filed in the District Court by the State and Board on or about December 17, 1958. Thereafter, notice of appeal was filed by appellants on December 30, 1958.

III.

The jurisdiction of this Court to review on appeal the final order and decree of the District Court is conferred by 28 U. S. C. § 1253, 62 Stat. 926.

IV.

Section 13a(1) of the Interstate Commerce Act, 49 U. S. C., was very recently legislated by the Congress of the United States and signed by the President of the United States on August 12, 1958. No decisions of this Court relating to Section 13a(1) have been found and none is believed to exist. However, cases which sustain the jurisdiction of a specially constituted statutory United States District Court of three judges under similar circumstances are numerous. On sustaining the right to appeal directly to this Court pursuant to 28 U. S. C. § 1253, from a decision of a specially constituted United States District Court of three judges which upheld the constitutionality of an Act of Congress there under attack and dismissing a complaint seeking injunctive relief see *Berman* v. *Parker*, 348 U. S. 26 (1954); on sustaining the right of direct appeal from a decision of a three-judge United States District Court in a suit to enjoin an order of the Commission see *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300 (1958).

V.

The provision of the Interstate Commerce Act, the validity of which is involved in this proceeding, is as follows:

Sec. 13a(1) [72 Stat. 571; 49 U. S. C. 13a(1)] (Appendix E, *infra*, p. 36a).

Other provisions of the Interstate Commerce Act applicable to the issues are principally Section 13(1) and (2) and Section 1(18) set forth in Appendix E hereto.

QUESTIONS PRESENTED

1. Whether the Notice and Statement filed by The New York Central Railroad Company with the Inter-State Commerce Commission on August 13, 1958 complied with the requirements of Section 13a(1) of the Interstate Commerce Act, Title 49, U. S. C.

2. Whether in issuing its Notice dated August 26, 1958 and its Order dated September 2, 1958, Finance Docket No. 20291, the Interstate Commerce Commission complied with the requirements of Section 13(1) and (2) of the Interstate Commerce Act, Title 49, U. S. C.

3. Whether the determination of the Interstate Commerce Commission, embodied in its Notice dated August 26, 1958 and its Order dated September 2, 1958, Finance Docket No. 20291, not to enter upon an investigation or otherwise to require continuation of service via the Weehawken Ferries constitutes an order of the Interstate Commerce Commission within the purview of Section 1336, Title 28, U. S. C.

4. Whether the determination of the Interstate Commerce Commission, embodied in its Notice dated August 26, 1958 and its Order dated September 2, 1958, Finance Docket No. 20291, ignoring or dismissing complaints and petitions for reconsideration filed therein, constitutes agency action subject to judicial review within the purview of Section 1009, Title 5, U. S. C.

5. Whether the majority of the District Court erred in refusing to consider that the Interstate Commerce Commission had failed to authorize increases in ferry fares at least to the extent conceded necessary in proceedings instituted by The New York Central Railroad Company in Docket No. 32359 (Fares and Charges via Weehawken Ferry).

6. Whether the majority of the District Court correctly construed Section 13a(1), Title 49, U. S. C., in holding that the passenger service of The New York Central Railroad Company via the Weehawken Ferries is free from public regulation at the sole discretion of the Interstate Commerce Commission.

7. Whether Section 13a(1), Title 49, U. S. C., as construed by the majority of the District Court is an unlawful delegation of legislative power in contravention to and derrogation of Article I of the Constitution of the United States in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation or otherwise to require continuation of service via the Weehawken Ferries.

8. Whether Section 13a(1), Title 49, U. S. C., as construed by the majority of the District Court, is violative of the due process clause of the 5th Amendment of the Constitution of the United States in that it deprives appellants of an opportunity to be heard on issues raised before the Interstate Commerce Commission.

9. Whether the majority of the District Court erred in refusing to receive evidence offered by appellants of the major curtailments of service by trains and ferries permitted by the regulatory agencies of the

States of New York and New Jersey in recent periods subsequent to the closing of the record before the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act, Title 49, U. S. C., New York Central R. Co. Ferry Abandonment, 295 I. C. C. 385 and 519.

10. Whether the majority of the District Court erred in refusing to receive and consider evidence of the franchise, charter and contractual obligations of The New York Central Railroad Company to the States of New Jersey and New York, the political subdivisions thereof and to its passenger users while continuing operations as a common carrier.

STATEMENT OF THE CASE

The Railroad operates as part of its system a line of railroad along the west shore of the Hudson River in both interstate and intrastate commerce. For many years past this line operated in both freight and passenger service between Albany, New York and New York City, the last mile or so of the easternmost portion being performed by ferries, car floats, lighters and barges between Weehawken, New Jersey and New York City. Since 1954 the Railroad through numerous petitions to the regulatory agencies of the States of New Jersey and New York and the Interstate Commerce Commission has sought to discontinue its twenty-four hour daily passenger service along this line while retaining its lucrative freight service.

After detailed hearings the State regulatory agencies have issued orders permitting the Railroad to reduce sharply the number of passenger train schedules to a minimum operating only during the morning and evening rush hours with no service on weekends or holidays.

As recently as June, 1958 the Railroad was permitted a further reduction by the State agencies so as to provide passenger service west from New York City only to West Haverstraw, New York, 34 miles away.

Notwithstanding, however, the Commission, upon application of the Railroad pursuant to Section 1(18) of the Interstate Commerce Act, issued its certificate authorizing discontinuance of the ferry service between Weehawken, New Jersey and New York City, without which the railroad passengers would have no available transportation across the Hudson River to their places of employment in New York City and return. Accordingly, from this order and determination, Board, State and appellants herein sued for injunctive relief in statutory three-judge United States District Court, District of New Jersey, on the grounds that the Commission was without jurisdiction in the matter and, in the alternative, *inter alia,* that the determination of the Commission was without substantial evidence of record. Appellants were granted leave to intervene as plaintiffs in that suit and participated fully throughout.

That District Court, thereafter, found that since the Railroad proposed and the Commission authorized discontinuance of less than the whole service on a line of railroad or portion thereof (because the trans-Hudson freight service was to be continued via car floats, lighters and barges), the Commission was without jurisdiction in the matter. The preliminary injunction theretofore issued was made permanent on December 31, 1957. *Board of Public Utility Comm., et al.,* vs. *United States, et al.* (D. C. N. J. 1957) 158 F. Supp. 98. From that decision the Railroad noted a direct appeal to this Court which has noted probable jurisdiction.

The appeal is still pending, and the record is in the process of being printed. *The New York Central Railroad Company* vs. *Board of Public Utility Comm. et al.*, October Term, 1957, No. 838; October Term, 1958, No. 41. Appellants herein are also parties to that appeal.

In passing upon the questions presented in that action the District Court in its unanimous opinion, although disposing of the matter on jurisdictional grounds, made the following observation:

> "Regarding the second section of this suit, which attacks the Commission's determination of public convenience and necessity, we have seriors doubts of the adequacy of the findings of fact and of their support by substantial evidence, but because of the definitive conclusion of lack of jurisdiction we do not pass upon the point at this time." 158 F. Supp at pages 103, 104.

Thereafter, on January 16, 1958, the Railroad petitioned the Commission to institute an investigation and, following which, to grant substantial increases in rates, fares and charges of 351 per cent for transportation on the ferries. I. C. C. Docket No. 32359. Appellants were parties to this proceeding and offered evidence on the record upon the closing of which the hearing examiner issued his proposed report recommending increases up to 200 per cent. These increases, although somewhat excessive, to a very large extent met with the approval of appellants upon the representation of the Railroad that the ferries would continue for an indefinite period in the future. Nevertheless, the Railroad, not satisfied with the recommendation of the examiner, petitioned for reconsideration, and notwithstanding the many months which have

passed since then the Commission has failed to proceed further in the matter.

During the closing hours of the 85th Congress, Second Session, Section 13 of the Interstate Commerce Act was amended by adding thereto Section 13a(1) here under attack. The haste with which this amendment was enacted, ostensibly with the principal design of permitting the Railroad to discontinue its trans-Hudson ferry service and override the earlier decision of the District Court (See Appendix A, dissenting opinion, footnote 1), is reflected by the fact that one day after it was signed into law the Railroad served a single notice on the Commission, under color of Section 13a(1), of discontinuance of the ferry service. One day later the Commission issued its Rules and Regulations governing procedure under Section 13a(1), effective August 29, 1958.

The Commission assigned the case Finance Docket No. 20291. Board and State filed with the Commission a formal complaint pursuant to the general complaint procedure of Section 13 on August 25, 1958, and appellants filed a similar complaint on August 26, 1958, both within the statutory time limit for such complaints. On that latter day, however, and at least one hour prior to the timely filing of the complaint of appellants, the Commission issued its "Notice" (Appendix B) wherein it concluded not to enter upon an investigation or otherwise stay the discontinuance of the ferry service. Immediately appellants petitioned for reconsideration and again requested an opportunity to be heard. Thereafter, on September 2, 1958, the Commission issued its Order in the same proceeding wherein it said, *inter alia*:

> "*And it is further ordered*, that the said petitions for reconsideration are denied. . . ." Appendix C.

This summary disposition of the matter was permitted notwithstanding the fact as found by the several state regulatory agencies as well as the Commission itself, that some eight or twelve thousand rush hour commuters would be left stranded with no public transportation between Weehawken, New Jersey and New York City. Accordingly, this action was commenced.

It should be added that although the District Court found for defendants in the case below and, accordingly, dissolved its preliminary injunction theretofore issued, nevertheless, it has granted a stay (Smith, D. J., dissenting) of its judgment, order and decree pending the final determination by this Court of this appeal. A subsequent motion of the Railroad to modify the terms of this stay was denied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Section 13a(1) was signed into law on August 12, 1958, and, as stated, two days thereafter the Commission promulgated rules and regulations effective August 29, 1958 governing notices and petitions filed by common carriers by railroad pursuant to the said Section. This suit was commenced in the District Court by State and Board on September 4, 1958, two days following the Order of the Commission denying consideration of the complaints and petitions filed therein. During the intervening period no more than three similar applications were made to the Commission. Not until the determination of the action by the court below did the deluge fall in the form of approximately thirty notice-applica-

tions to discontinue passenger train service in every part of the nation. Indeed, so ambitious have become the railroads that one, the Lehigh Valley, seeks to discontinue all of its mainline passenger operations. Commission Finance Docket No. 20443. And while it is encouraging to note that the Commission, at least on that application, has suspended the effective date of proposed discontinuance for the statutory period of four months to afford investigation, nevertheless, the enormous volume of train miles and thousands of passengers involved in all areas of the land bespeak with clarity the national scope and enormity of the legislative and administrative action here under attack.

The questions presented by this appeal are divisible, roughly, into two general categories: (A) those inquiring into the validity of the actions by the Railroad and the Commission and the protection afforded the public therein, and (B) those inquiring into the validity of Section 13a(1) as construed by the majority of the District Court.

A. THE ISSUES ON THE VALIDITY OF THE ACTIONS OF THE RAILROAD AND COMMISSION AND PROTECTION AFFORDED THE PUBLIC.

1. Invalidity of the Notice Filed by the Railroad

In ostensible compliance with Section 13a(1), one day after it became law the Railroad filed a one-sheet, two-sentence, mimeographed Notice with the Commission together with a nine page argumentative statement of its counsel, upon the basis of which the Railroad sought to discontinue a vital instrument of public transportation which serves daily an excess of eight thousand passengers for whom there exists no alternate means of public transportation. Whether the

Railroad, or any railroad, may discontinue all or a substantial portion of its passenger service by such summary action does not find support in the statute, the clear language of which requires, among other things, that a separate notice be given for each train and ferry.

The language of the statute is explicit and the Commission's own interpretation of that language contained in its Rules and Regulations promulgated on August 14, 1958, two days after passage of Section 13a(1), support the conclusion of the dissenting judge of the District Court. It was not the intention of Congress, while leaving in force Section 1(18) of the Interstate Commerce Act relating to complete discontinuance of service over a line of railroad or any portion thereof with its provisions for the ascertainment of public convenience and necessity, that Section 13a(1) should be used as a statutory subterfuge to perfect complete discontinuance upon the filing of a mere two sentence notice by the carrier, followed by inaction of the Commission without investigation.

Admitting, *arguendo*, that it may have been the intention of Congress to vest in the Commission uncontrolled discretion to permit discontinuance of the service of a single ferry and that there exists no constitutional bar to the granting of such unbridled discretion, it is submitted, nevertheless, that the intention of Congress to promote safe, adequate, economical, and efficient railroad service, decreed by Congress as the National Transportation Policy, 49 U.S.C. preceding § 1, will be frustrated and destroyed if this Railroad or any other is permitted to destroy its passenger service in such summary fashion. The purpose of the Notice

to be filed by the Railroad with the Commission is not only to advise the Commission and the traveling public of the proposal of the Railroad, but, in addition, a statutorily correct and adequate notice must be filed because the statute requires it.

Determination of this single issue in the direction to be advocated by appellants will be sufficient to remand the proceeding to the District Court and thence to the Commission for appropriate action.

2. Section 13(1) and (2) Proceedings are Applicable to Section 13a(1)

An important question on this appeal is whether Section 13a(1) should be so construed as to require the Commission to follow the general complaint and investigation provisions of Section 13(1) and (2) and, if so, did the action of the Commission in issuing its Notice dated August 26, 1958 and its Order dated September 2, 1958, comply with such provisions.

Section 13a(1) was made an integral part of Section 13 of the Interstate Commerce Act, wherein is imposed a general hearing requirement on the Commission in complaint proceedings by virtue of Section 13(1) and (2) which remain in full force and effect. Section 13(1) provides that when any person files a petition with the Interstate Commerce Commission "complaining of anything done or omitted to be done by any common carrier", the Commission shall forward the complaint to the carrier who shall either satisfy the complaint or answer it in writing within a reasonable time. If the complaint is not satisfied, or if there shall appear to be any reasonable ground for investigating the complaint, the Commission is under a duty to investigate it. This Court has held that the Commission

has no alternative but to investigate. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 39 (1904). Under Section 13(2) the Commission is not required to give the carrier the opportunity of satisfying the complaint, but is required to investigate every complaint forwarded to it by a State railroad commissioner or commission.

Immediately after the Railroad, purporting to act under Section 13a(1), filed with the Commission its notice of proposed discontinuance, appellants, on August 14, 1958, informed the Commission of their protest to the proposed discontinuance and requested the Commission to hold an investigation. On August 26, 1958 the said appellants filed their formal complaint. The appellants State and Board similarly filed their complaint with the Commission on August 25, 1958 requesting a public hearing and investigation to determine present and future public convenience and necessity as required by Section 13a(1). The Commission not only did not investigate or grant a hearing, but "concluded not to enter upon an investigation of the proposed discontinuance or otherwise to require that such ferry service be continued", and on August 26, 1958 and September 2, 1958 issued its Notice and Order respectively to that effect.

If the procedural provisions of Section 13(1) and (2) are to be read in conjunction with Section 13a(1), it is clear that the agency actions taken on August 26 and September 2, 1958 did not comply with existing and well-established statutory complaint and investigation provisions. It is submitted that Congress selected existing Section 13 to which to add the provisions found in Section 13a(1) for the very reason of the already existing and judicially well defined complaint.

procedure there embodied. The action of the District Court would have this obvious conclusion denied and require appellants and others to depart without opportunity to be heard notwithstanding the filing of complaints and petitions which on their face bespeak prima facie of their sufficiency.

3. and 4. Availability of Judicial Review of the Commission's Notice and Order

A substantial question in this appeal is whether the determination of the Commission, embodied in its Notice dated August 26, 1958 and its Order of September 2, 1958, Finance Docket No. 20291, not to enter upon an investigation or otherwise require continuation of service via the Weehawken ferries constitute *orders* of the Commission within the purview of Section 1336, Title 28, U.S.C. and *agency action* subject to judicial review within the purview of Section 1009, Title 5 U.S.C.

The District Court, in its majority opinion, held that it had no jurisdiction under Section 1336, because the "Notice" of August 26, 1958 was not an "Order" covered by Section 1336. The majority of the District Court also held that the said agency actions were not reviewable under Section 1009, Title 5, U.S.C. of the Administrative Procedure Act, because in Section 13a(1) Congress committed to the Commission discretion to determine whether or not to institute an investigation of a proposed discontinuance. It is submitted that the District Court erred in so holding.

The Administrative Procedure Act, 5 U.S.C. 1009(c) makes final "agency action" reviewable, and "agency action" is defined in 5 U.S.C. 1001(g) to include "* * * the whole or part of every agency rule, order,

license, sanction, relief, or the equivalent or denial thereof, or failure to act." As defined in Section 1001(d), Title 5 U.S.C. "Order" means "the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) of any agency in any matter other than rule making but including licensing." Irrespective of the term "Notice" used by the Commission, the action of the Commission in concluding not to enter upon an investigation or otherwise require the continuance of the ferry service was a juristic act by which the Commission purported to dispose finally of the issues, and was an "Order" subject to review under Section 1336, Title 28, U.S.C. The "Order" of the Commission dated September 2, 1958 denied all petitions for reconsideration except that of the Railway Labor Executives' Association which requested the imposition of certain conditions for the protection of employees adversely affected by the proposed discontinuance.

There is actually no pertinent distinction between the "Notice" of August 26th and the "Order" of September 2nd. The effect of the Notice of August 26th was to dispose finally of a matter which Section 13a(1) purported to vest in the Commission. The Order of September 2nd was a final order upon reconsideration of the Commission's decision announced in the Notice. This Court, in *Frozen Food Express* v. *United States*, 351 U.S. 40, 44 (1956), laid down the test for reviewability of orders of the Interstate Commerce Commission wherin it held that an order which has "an immediate and practical impact" and is not "abstract, theoretical, or academic" is reviewable.

Contrary to the conclusion of the majority of the District Court that Section 13a(1) gives exclusive and

unfettered discretion to the Commission in determining whether or not it will enter upon an investigation, and, accordingly, that its decision to act or refrain from action is not reviewable under Section 1009, Title 5 U.S.C. it is submitted that Section 1009, which excepts from review agency action which is by law committed to agency discretion, does not mean that there can be no review merely because agency action involves an element of discretion or judgment. Whether the court would set aside an agency action founded upon the exercise of discretion and judgment is a totally different question from whether the court may review the action for purposes of determining its validity. *Homovich* v. *Chapman*, 191 F. 2d 761, 79 U.S. App. D.C. 150 (1951). No matter on what ground an attack is based, the general question as to whether certain administrative action is valid is a judicial question. *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U.S. 541 (1912). All questions as to the validity of administrative procedure are judicial questions for the courts. *Morgan* v. *United States*, 298 U.S. 468 (1936). Whether a finding is supported by substantial evidence is a judicial question. *United States* v. *Louisville & N. R. Co.*, 235 U.S. 314 (1914). Whether Congress authorized the administrative method of proof and of adjudication pursued by the agency is a judicial question. *The New England Divisions Case*, 261 U.S. 184 (1923). Questions of law affecting private rights involved in an administrative determination are judicial questions. Judicial questions are always open for the independent decision of an appropriate court of law. Vom Bauer, *Federal Adminsitrative Law*, ed. 1942, Vol. 1, Section 424 et seq.

Since the questions raised in the District Court with respect to the Commission's decisions on August 26

and September 2, 1958, were judicial questions, the court erred in holding that it had no jurisdiction to review such decisions under Section 1009 of the Administrative Procedure Act.

Furthermore, even though courts may have no jurisdiction to review administrative discretion when it is reasonably exercised, in appropriate circumstances they can compel correction of an abuse of discretion. *Mastrapasqua* v. *Shaughnessy* (CA NY 1950), 180 F. 2d 999.

Here the refusal of the Commission to investigate upon the complaints and protests of appellants and others or to test their sufficiency was not a ministerial determination, was not made in good faith, was not made in the public interest, was not supported by the evidence in the record before it at the time it rendered its decision, and was not supported by the necessary basic findings of fact. This was arbitrary action on the part of the Commission. Where discretion is conferred upon an administrative officer or agency to render a decision, its decision must be honestly rendered, and if it is arbitrary or capricious, or rendered in bad faith, then the courts have the power to review the decision and set it aside. *Crocker* v. *United States*, 127 F. Supp. 568, 130 Ct. Cl. 567 (1955). An administrative determination must not be arbitrary. *Myles Salt Co.* v. *Board of Com'rs. of Iberia & St. Mary's Drainage Dist.*, 239 U.S. 478 (1916).

Even in cases where judicial review is expressly precluded by statute or agency action is expressly committed by statute to agency discretion, where questions are raised on the interpretation and con-

stitutionality of the statute under which the discretion is given, as was done in the District Court proceeding, those questions may be tested and reviewed by the courts. See *Ludecke* v. *Watkins*, 335 U.S. 160 (1947).

The determinations of the Commission embodied in its notice of August 26, 1958 and its Order of September 2, 1958 are reviewable, and the majority of the District Court erred in holding to the contrary.

5. Failure to Consider Recommended Fare Increases as Relieving Financial Burden

The basis of the Commission's orders allegedly was the record made before it by the Railroad in its abandonment of service action brought pursuant to Section 1(18) of the Interstate Commerce Act four years ago and the record made before it upon an application of the Railroad during the Spring of 1958 for an increase in fares for transportation via the ferries. Of course, the Railroad seeks to discontinue the service solely because of its economically deficient character. Therefore, when the Commission's hearing examiner recommended fare increases up to 200 per cent which, when coupled with almost contemporaneous reductions in operating costs, would reduce substantially and probably eliminate all deficits, appellants considered this a factor which must weigh heavily upon the Commission in making its determination.

However, the Commission failed or refused to alter its adamant stand notwithstanding that appellants, the users of the ferries, were fully prepared to pay more for their transportation so long as the service continued. Obviously, appellants had little choice in

the matter, inasmuch as the ferries offered the only means of public transportation between the rail terminal at Weehawken, New Jersey and New York City. But upon a survey of the more than five thousand members of appellant, the Citizens United Transit Committee, it was revealed that they were motivated to a larger degree by a belief that the Railroad actually deserved financial improvement; said appellants represented to the Commission during the course of that proceeding that substantial fare increases would not meet with their resistance and the hearing examiner arrived at this recommendation accordingly.

Rather than act upon the recommendations of its own examiner, the Commission chose instead a course of inaction. It is submitted that the District Court should have considered this failure or refusal of the Commission to act. Certainly removal of the economic deficit allegedly produced by the ferry operation would remove the sole lawful basis for the application of the Railroad, particularly in light of the large number of ferry users and the absence of any alternative means of public transportation.

6. Whether to Regulate or Not Does Not Rest Upon the Sole Discretion of the Commission

This Court has long recognized the divisibility of commerce between the states into three categories. *Covington & C. Bridge Co.* v. *Kentucky*, 154 U.S. 204, 209 (1894), held:

> "The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the states is

exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all."

It is to this second class of cases—those sometimes termed concurrent jurisdiction—to which belong the Railroad's Trans-Hudson ferries. *Braniff Airways* v. *Nebraska State Board,* 347 U.S. 590 (1954); *California* v. *Thompson,* 313 U.S. 109 (1941); *Southern Pacific R. Co.* v. *Arizona,* 325 U.S. 761 (1945); *Wilmington Transp. Co.* v. *Railroad Com.,* 236 U.S. 151 (1915); *Port Richmond & B. P. F. Co.* v. *Hudson County,* 234 U.S. 317 (1914); *Atlantic C. L. R. Co.* v. *Georgia,* 234 U.S. 280 (1914); *New York C. & H. R. R. Co.* v. *Hudson County,* 227 U.S. 248 (1913); *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196 (1885); *Cardwell* v. *American River Bridge Co.,* 113 U.S. 205 (1885); *Wiggins Ferry Co.* v. *East St. Louis,* 107 U.S. 365 (1883); *Pound* v. *Turck,* 95 U.S. 459 (1878); *Gillman* v. *Philadelphia,* 70 U.S., 3 Wall. 713 (1866); *Conway* v. *Taylor,* 66 U.S., 1 Black 603 (1862); *Fanning* v. *Gregoire,* 57 U.S., 15 How. 524 (1853); *Wilson* v. *Blackbird Creek March Co.,* 27 U.S., 2 Pet. 245 (1829).

Prior to the enactment of Section 13a(1), regulation of the quantum of service offered by the Railroad reposed in the States of New York and New Jersey. There seems to exist little doubt but that with Section 13a(1) Congress did indeed intend to preempt the field, thereby ousting state jurisdiction. However, it is submitted that in such a situation the action of Congress must be carefully scrutinized. The argument of the Railroad, adopted by the District Court, was to the effect that Congress, by its action, did not

repose regulatory jurisdiction in the Commission, but, on the contrary, left to the Railroad, a public utility, unhampered power to regulate itself. The conclusion of the majority of the District Court is to the effect that it is the Commission which decides whether or not the Railroad service will be regulated and that in this determination the public may not be heard to speak. Furthermore, the determination of the Commission was held not to be judicially reviewable.

It is submitted that the Congress did not—indeed, it could not—delegate to the Commission such a power in the absence of adequate legislative standard designed to foreclose abuse of Commission discretion. Whether or not passenger train service is to be free from regulation is for the determination of the Congress and not of the Commission.

B. THE CONSTITUTIONAL ISSUES.

7. Absence of Legislative Standards

A substantial question in this case is whether Section 13a(1), Title 49, U.S.C. as construed by the majority of the District Court is an unlawful delegation of legislative power in contravention to and derogation of Article I of the Constitution of the United States in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation or otherwise to require continuation of service via the Weehawken ferries.

Section 13a(1) is the equivalent of a provision giving the Commission authority to permit the discontinuance of operation upon the application of the carrier without legislative guidance to be followed by the Commission in the exercise of this authority. No criteria

or standards whatever are prescribed in the statute for the guidance of the Commission in the exercise of the power granted to it. By simple failure to act the Commission is empowered to make a permanent alteration in the legal relationship previously existing between a common carrier and the governments and people of the States served by it. The statute does not require the Commission in deciding not to institute an investigation to base its decision upon substantial evidence in the record before it, nor does it require the Commission to make any basic findings of fact to support its decision. The authority to act or to refrain from acting is given the Commission without even the vestige of legislative standards or other legal principles to control the Commission. Instead, permissive power of regulation is left to the whim of the Commission without any restraint whatsoever to avoid arbitrary action and abuse of discretion in contravention of constitutional safeguards setting limitations to arbitrary action.

The Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article I, Section 1. The power to regulate interstate commerce is given to Congress. Article I, Section 8, paragraph 3. That Congress cannot delegate its essential legislative power nor may it be usurped by administrative agency action is a basic principle of constitutional law not open to dispute. Where Congress entrusts administrative agencies with broad control over activities with which it does not choose to deal directly, Congress must establish appropriate standards to guide administrative action. In every case in which the

question of delegation of legislative power by an act of Congress has been raised, this Court has recognized this constitutionally non-delegatory aspect of Congressional power and, accordingly, has held statutes invalid in the absence of Congressionally prescribed standards of conduct. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

If Congress is to take away from the States the right to regulate the amount or kind of serice to be furnished by a public carrier and delegate that authority to the Commission or even to the Railroad, it is submitted that the statute should be carefully scrutinized.

In the event the Commission does elect to investigate, then the Congressional standards are found in abundance in Section 13a(1). These express legislative standards are "public convenience and necessity" and "undue burden on interstate commerce", both well understood through judicial interpretation and administrative application. It is submitted that the intent of Congress was to impose these same standards upon the Commission when it exercised its determination in the instant case. The contrary construction placed upon Section 13a(1) by the majority of the District Court rendered the statute unconstitutional.

8. Section 13a(1), as Construed, Is Violative of the 5th Amendment

The power of Congress to regulate commerce is not absolute, and the exercise of that power is subject to the requirements of the Fifth Amendment. *United States* v. *Chicago, M. St. P. & R. R. Co.*, 282 U.S. 311

(1931), affirming *Chicago, M. St. P. & R. R. Co.* v. *United States,* 33 F. 2d 582 (Ill. N.D. 1929); *Currin* v. *Wallace,* 306 U.S. 1, 14 (1939). Congress cannot constitutionally authorize the Commission to permit a railroad to discontinue the operation of any train or ferry without the exercise of regulatory power in accordance with applicable principles developed by the courts in the light of the Constitution.

The first of those principles is that regulatory power delegated by Congress must be exercised in conformity with adequate standards prescribed by Congress. The second is that such regulatory power, when it affects the interests of the public, can be exercised only in conformity with the requirements of due process, including an opportunity for a hearing and the presentation of evidence pertinent to the prescribed standards.

The basis deficiencies of due process in Section 13a(1) standout clearly when that section is compared with Section 13a(2). Both Sections recognize the existence of State regulatory laws, regulations and orders controlling the operation of trains and ferries. The provisions of Section 13(a)(1) are in sharp contrast with those of Section 13a(2) which gives the Commission jurisdiction to take action only after full hearing and upon finding of specific facts with prescribed criteria as a prerequisite of action. In the well known case of *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U.S. 88 (1913), this Court rejected the government's contention that an order based on the opinion of the Commission that certain charges were unreasonable could not be set aside even if the said opinion was without substantial evidence to support it. The Court said:

> "* * * if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." 227 U.S. at page 90.

This statement of the Court, though involving rates and charges under a law which specifically gave a right to a hearing, is applicable in principle to the present case. As construed by the majority of the District Court, the authority which Section 13a(1) purports to vest in the Commission may be exercised without any hearing whatever. The repugnance of such procedures, based upon no standards or criteria, to the 5th Amendment to the Constitution, is axiomatic.

Section 13a(2) appears to satisfy the requirement of procedural due process. Section 13a(1) clearly does not. The separate application of the two sections would, moreover, result in unreasonable discrimination between two large groups of persons—those who are obliged to cross State lines and those who are not obliged to cross State lines in traveling to and from their places of business. The members of the first group could, under Section 13a(1) be deprived of all necessary and convenient means of railroad transportation

on 30 days' notice without hearing. The denial of due process through inadequacy of established administrative criteria and controls, absence of the right of hearing and of adequate notice in Section 13a(1), as compared with the wholly unwarranted classification of carriers in Section 13a(2) is a denial of equal protection of the laws and is prejudicial and discriminatory in the application of Congressional power under the Constitution as between the several States and their citizens.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The right to a full hearing in a quasi-judicial proceeding conducted by an administrative agency embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. *Morgan* v. *United States*, 304 U.S. 1, 18, 19 (1938). The basic elements of a full and fair hearing include the right to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut such evidence. *United States* v. *Dillman*, (C.A. 5, 1944) 146 F. 2d 572, 574, certiorari denied, 325 U.S. 870.

Tested by the aforementioned essentials of due process, there being no requirement in Section 13a(1) of notice or hearing as prerequisite to the Commission's approval of a proposed discontinuance of a train or ferry operating in interstate commerce, it is sub-

mitted that the statute is unconstitutional in that it denies interested and affected parties due process of law in contravention of the 5th Amendment. Accordingly, the statute and resulting action of the Commission cannot be upheld.

9. and 10. Right to Trial De Novo on Constitutional Issues

Questions of constitutional right and power raised by administrative action are appropriate for the exercise of judicial power and must be tried *de novo*. Trial *de novo* has two outstanding characteristics, (1) the reviewing court must reach its own independent judgment on the facts and the law without being bound by the rule of administrative finality on the facts, and (2) additional evidence may be introduced, so that the case need not be decided on the administrative record alone. Mr. Chief Justice Hughes, in *Crowell* v. *Benson*, 285 U.S. 22, 60, 64 (1932), said:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that function. [285 U.S. at p. 60] * * * We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own records and the facts elicited before it." (285 U.S. at p. 64).

Courts must decide *de novo* whether the action of an administrative agency is repugnant to the Constitution (*United States* v. *Louisville & N. R. Co.*, 235 U.S. 314 (1914)); whether an order deprives a party of his property without due process of law (*Missouri*,

K. & T. R. Co. v. *Oklahoma*, 271 U.S. 303 (1926)); or denies him a hearing and thus denies due process of law (*United States* v. *Louisville & N. R. Co., supra*; whether the constitutional power of Congress has been exceeded, whether a party has been deprived of equal protection of the laws as by administrative discrimination, and any other question of constitutional right or power, regardless of how the question arises. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936). The Court may, in proceedings to set aside an order as not in accordance with law, make its own examination and determination of facts wherever that is deemed necessary to enforce a constitutional right properly asserted. *Crowell* v. *Benson, supra.*

Whenever a party asserts that an administrative determination, if made effective, will deprive him of a constitutional right, he is entitled to have the constitutional question—but that question only—tried *de novo* in the reviewing court, so that an independent judicial determination of the constitutional question may be had. Vom Bauer, *Federal Administrative Law*, (*op. cit.*) Sections 262-264.

Upon trial *de novo* of a constitutional question the reviewing court must hear and weigh all competent evidence, receiving, if necessary, relevant evidence outside the administrative record bearing on the constitutional question (*St. Joseph Stock Yards Co.* v. *U. S., supra; Chicago, B-R. Co.* v. *Osborne*, 265 U.S. 14 (1924)); and reach its independent judgment on the facts and the law (*St. Joseph Stock Yards Co.* v. *U. S., supra;* See *Spano* v. *Western Fruit Growers* (C.A. 10 1936) 85 F. (2d) 150).

Trial *de novo* should be had with a view to setting forth the facts as they exist at the time of trial in the District Court, or as nearly as they may be ascertained as of that time. *Baltimore & O. R. Co.* v. *U. S.*, 298 U.S. 349 (1936). A party's right on trial *de novo* to challenge administrative findings is not conditional upon the production of the evidence taken in the administrative proceedings. *Spano* v. *Western Fruit Growers, supra;* Vom Bauer *Federal Administrative Law*, (*op. cit.*) Section 745-747.

Appellants were deprived of their right to trial *de novo* by the action of the majority of the District Court in denying their request to present evidence relative to the constitutional issues there raised.

CONCLUSION

Following the entry of its final order and decree, the District Court directed that the effective date of its final order be stayed and that the preliminary injunction theretofore issued be continued pending final determination by this Court of the issues. In so doing, however, the District Court conditioned its stay upon the filing by appellants State and Board and by appellants County of Bergen, *et al*, of their notices of appeal, the record and the jurisdictional statements all by January 2, 1958. Thus deprived of the usual ninety days within which to docket their appeal, appellants nevertheless have sought herein to impress upon this Court the seriousness of the issues here raised, and as clearly recognized by the District Court, the importance of their final determination by this Court.

The issues raised are substantial and their final resolution by this Court is essential, not only to appellants